SUPREME COURT, U. S.

AUG 12 1969

JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969.

No. 462

WILLIAM SCOTT, JR.,

Petitioner,

vs.

THE OHIO CITIZENS TRUST CO.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI

To the Court of Appeals of Lucas County, Ohio.

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OPINIONS BELOW.

There have been no written opinions in any of the lower courts.

STATEMENT OF JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3) inasmuch as the Ohio Courts have denied rights and claims of the petitioner guaranteed under the Constitution of the United States, and the State Courts have decided a federal question of substance in a way not in accord with applicable decisions of this Court. (Rule 19.1(a) Rules of the Supreme Court of the United States.) Further, the validity of statutes of the State of Ohio are drawn in question on the ground of their being repugnant to the Constitution of the United States.

On or about January 8, 1969, the Court of Appeals of Lucas County, Ohio, affirmed the judgment of the Court

of Common Pleas of Lucas County, Ohio. On May 14, 1969 the Supreme Court of Ohio denied a motion to certify the record and dismissed the appeal on the ground that no substantial constitutional question exists.

The original judgment of the Lucas County Court of Common Pleas was a default judgment in the amount of $8,500.00, plus interest and costs, which judgment was entered by virtue of petitioner's refusal to answer certain written interrogatories on the ground that their answers might tend to incriminate him.

QUESTIONS PRESENTED.

1. Is Section 3763.05 of the Ohio Revised Code violative of 5th and 14th Amendment rights by requiring persons to answer written interrogatories concerning wagering transactions and granting immunity only in case such persons repay wagering winnings found due by the court?

2. Where a person refuses to answer written interrogatories on the ground that such answers might tend to incriminate him, and the immunity granted by the Ohio statute is conditional upon repayment of wagering winnings found due by the Court, are such person's 5th and 14th amendment rights violated when a default judgment is rendered against him for such refusal to answer?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

The provisions of the United States Constitution involved are those portions of the 14th Amendment which provide:

> * * * nor shall any state deprive any person of life, liberty or property, without due process of law;

nor deny to any person within its jurisdiction the equal protection of the laws.

and the 5th Amendment providing:

* * * nor shall be compelled in any criminal case to be a witness against himself.

The statutory provisions of the State of Ohio are Sections 3763.02, 3763.04 and 3763.05, Revised Code of Ohio:

Section 3763.02 Money lost at games may be recovered; exceptions. (GC Section 5966)

If a person, by playing a game, or by a wager, loses to another, money or other thing of value, and pays or delivers it or a part thereof, to the winner thereof, such person losing and paying or delivering, within six months after such loss and payment or delivery, may sue for and recover such money or thing of value or part thereof, from the winner thereof, with costs of suit.

Neither this section nor section 3763.04 of the Revised Code shall apply to any business transacted upon a regularly established stock exchange or board of trade through a member thereof whose relation to the transaction is that of broker only, and who actually delivers or receives the securities or other commodity bought or sold in accordance with the rules and regulations of said stock exchange or board of trade.

Section 3763.04 Suit by third party. (GC Section 5969)

If a person losing money or thing of value, as provided in section 3763.02 of the Revised Code, within the time therein specified, and without collusion or deceit, does not sue, and effectively prosecute, for such money or thing of value, any person may sue for and recover it, with costs of suit, against such winner, for the use of such person prosecuting such suit.

Section 3763.05 Action for discovery. (GC Section 5970)

A person, liable under sections 3763.01 to 3763.08, inclusive, of the Revised Code, may be compelled to answer, upon oath, interrogatories annexed to the petition for the purpose of discovery of his liability. Upon discovery and repayment of the money or other thing, the person discovering and repaying it, with costs, shall be acquitted and discharged from further punishment, penalty, or forfeiture, for winning such money or thing discovered and repaid.

STATEMENT OF THE CASE.

This case was disposed of entirely upon pleadings. It was initiated by the filing of a Petition by the respondent on Oct. 12, 1967, in Lucas County Court of Common Pleas. The petition alleged that the respondent had obtained a judgment in the amount of $10,000.00 against one Thomas C. Ellis of Toledo, Ohio which judgment remained unpaid; that said judgment was obtained on Feb. 23, 1967. The petition further stated that on Nov. 2, 1966, this petitioner, and another person named McKenzie, played poker with the said Ellis in Toledo, Ohio and that they won the sum of $8,500.00 from Ellis, and converted said sum to their own use.

Attached to the petition were 10 interrogatories, which the respondent requested the defendants to answer under oath pursuant to Section 3763.05, Ohio Revised Code. These interrogatories inquired generally about whether the defendants did, in fact, play poker with the said Ellis. The interrogatories are contained in the Appendix herein.

The defendant McKenzie has never been served with process in this case. However, the petitioner was promptly served and in response to the petition and the interroga-

tories, filed two pleadings, a motion to strike from the petition and a demurrer to the interrogatories. The motion to strike was based on the alleged irrelevancy of the allegations in the petition concerning the relationship between the respondent and the said Ellis. The demurrer was based on the petitioner's contention that the demand to answer the interrogatories concerning gambling violated his constitutional right not to be required to give testimony against himself which might tend to incriminate him. Both the motion to strike and the demurrer to the interrogatories were overruled, without opinion. Thereafter, the petitioner filed his Answer, primarily in the form of a denial, leaving the respondent to its proof. The petitioner refused to answer the interrogatories insisting on his constitutional rights. Thereupon the respondent filed a motion for a default judgment for failure to answer the interrogatories. A brief, non-evidentiary hearing was held, at which time the petitioner again asserted his constitutional rights and further indicated that if the Court were inclined to grant a default judgment, a hearing should be held for the purpose of requiring the respondent to prove the amount of its requested judgment. The trial court dismissed both of petitioner's contentions and granted a default judgment to the respondent for the full amount claimed, $8,500.00 and costs.

The petitioner thereupon took an appeal to the Court of Appeals for Lucas County, which affirmed the judgment by a 2-1 vote. A copy of the minutes of the Court of Appeals, together with its Journal Entry are contained in the Appendix herein.

Thereupon a motion for leave to appeal was filed in the Ohio Supreme Court and an appeal of right was also filed. Both appeals were dismissed, the Ohio Supreme Court dismissing the appeal sua sponte for the reason that it could find no substantial constitutional question.

REASONS FOR GRANTING THE WRIT.

The judgment herein clearly is in conflict with applicable decisions of this Court. In *Malloy v. Hogan,* 378 U.S. 1, this Court applied fifth amendment privileges against self-incrimination to the states, by virtue of the 14th Amendment. In that case this Court said that these amendments protected:

> "* * * the right of a person to remain silent unless he chooses to speak, in the unfettered exercise of his will, and to suffer no penalty * * * for such silence." 378 U.S. 1, 8.

Petitioner's chief complaint is that if he were to admit gambling, or other evidence tending to incriminate him in his answers to the interrogatories, and lose the case, he would be subject to criminal prosecution for his answers unless he paid the judgment. In other words, a price was being exacted for his assertion of his constitutional rights.

It is quite apparent that in the case at bar the petitioner's right to remain silent is being interfered with and whether or not he answers, he will be penalized. For instance, if he answers the question regarding gambling and admits to having participated in a gambling enterprise, he is thereby admitting a violation of the criminal law. There would be little point in arguing that no one would be around to enforce this because it may be noted that the attorney for the respondent in the case at bar is also a police prosecutor of the City of Toledo. If he refuses to answer, he thereupon takes the risk of having a default judgment levied against him and this is exactly what happened herein. If he answers and as a result of his answer a judgment is awarded against him, he does not have any immunity unless he pays that judgment. Therefore, the immunity statute is conditional upon the pay-

ment of money. In *Garrity vs. New Jersey*, 385 U.S. 493, 87 S. Ct. 616, this Court said, at page 500 of 385 U.S.:

> "There are rights of constitutional stature whose exercise a state may not condition by the exaction of a price."

The Court cites in support thereof *Western Union Telegraph Company vs. Kansas*, 216 U.S. 1, 30 S. Ct. 190. The facts in the *Garrity* case indicated that policemen were required to answer incriminating questions in an investigation or else lose their jobs. This Court found this to be an unconstitutional condition. That this doctrine is not new is reflected by the citation of *Boyd vs. U. S.*, 116 U.S. 616, 6 S. Ct. 524 (1886), where it was held improper to require persons to produce incriminating documents or suffer a forfeiture of their goods.

Further, in *Slochower vs. The Board of Education*, 315 U.S. 551, 76 S. Ct. 637, a school teacher for the public school system was required to testify before a Congressional Committee or lose his job. This Court ruled that his right to assert Fifth Amendment self-incrimination provisions could not be conditioned upon his right to remain an employee of the state. In *Spevack vs. Klein*, 385 U.S. 511, 87 S. Ct. 625, an attorney at law was ordered to give testimony in a disbarment proceeding against himself or else suffer the penalty of disbarment for refusing to testify. In each of these cited cases, the person involved was required to choose between the Fifth Amendment and another value. In *Garrity*, it was his job. In *Slochower*, it was his job. In *Spevack*, it was his license to practice law and in *Boyd*, it was forfeiture of goods. In all four of those cases this Court ruled that such prices could not be placed upon a person's right to refuse to answer incriminating questions. In the case at bar, the petitioner had the choice of refusing to incriminate himself or

protect himself against a default judgment. By refusing to answer the questions and thereby exercising his right under the Fifth Amendment as applied to the states by the Fourteenth Amendment, he suffered a default judgment. It is no excuse to say that he would have had immunity if he had answered the questions because the immunity was based on his payment of a judgment, the very price tag that this Court ruled improper in the *Garrity* case.

In *Griffin vs. California,* 380 U.S. 609, 85 S. Ct. 1229, this Court said that the penalty referred to in the Fifth Amendment in the context of a penalty for not testifying means any sanction which makes assertion of the Fifth Amendment costly. Further, the *Spevack* case says that the penalty is not restricted to fine or imprisonment.

> "We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others." 385 U.S. at 516.

The danger faced by the defendants answering the questions is underlined by the decision in *Marchetti vs. U. S.,* 88 S. Ct. 697, where the Supreme Court held that the registration provision of the wagering tax law was unconstitutional because of a real hazard of self-incrimination by registering. It is submitted that the hazard in the case at bar is no less real.

It is, therefore, submitted that the so-called immunity statute herein is actually unconstitutional on its face and the demurrer to the interrogatories asked in response to it should have been sustained.

CONCLUSION.

It clearly appears to the petitioner that the rulings of the various Ohio courts which have ruled upon the question, are directly in conflict with the line of cases decided by this Court and which have been cited in this petition.

Accordingly, it is respectfully submitted that the Ohio Courts were in error in requiring petitioner to answer the interrogatories; and that, therefore, this petition should be granted and this case remanded to the Court of Appeals of Lucas County, Ohio, with instructions for that Court to order the Lucas County Court of Common Pleas to vacate the judgment against the petitioner; to grant petitioner's demurrer to the interrogatories; and to proceed to hear said case consistent with the views expressed herein.

Respectfully submitted,

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APPENDIX.

JOURNAL ENTRY OF THE COURT OF COMMON PLEAS OF LUCAS COUNTY, OHIO.

This day this cause came on to be heard on Plaintiff's motion for judgment in the amount of $8,500.00, together with interest thereon at the rate of 6% per annum from November 2, 1966, until paid and for its costs for the reason that the Defendant has failed to answer interrogatories filed herein by Plaintiff and upon the memorandum in support thereof and the court being duly advised in the premises finds that such motion is well taken and should be granted.

IT IS, THEREFORE, ORDERED, ADJUDGED, AND DECREED that Plaintiff have judgment against the Defendant, William Scott, Jr., in the amount of $8,500.00, together with interest thereon at the rate of 6% per annum from November 2, 1966, until paid and for its costs herein.

JOURNAL ENTRY OF THE COURT OF APPEALS OF LUCAS COUNTY, OHIO.

This day this cause came on to be heard on Defendants-Appellant's Assignments of Error and upon the Briefs and Arguments in support thereof and in opposition thereo, and the Court being duly advised in the premises finds that the action herein is an action ex contractu by virtue of Ohio Revised Code Section 3763.04; that Defendants are required to answer Interrogatories as provided by Ohio Revised Code Section 3763.05 with right of immunity; and that therefore, the Assignments of Error are not well taken.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the judgment of the Court of Common Pleas of Lucas

County, Ohio, be, and the same hereby is, affirmed at Appellant's cost and the cause is hereby remanded to the said Court for execution of judgment.

MINUTES OF THE LUCAS COUNTY COURT OF APPEALS.

The Ohio Citizens Trust Company, Appellee vs. William Scott Jr. et al., Appellant. Finding that the action herein is an action ex contractu by virtue of Revised Code Sec. 3763.04; that deft is required to answer interrogatories as provided by Revised Code Sec. 3763.05 with right of immunity (See *Kleimeyer vs. Payne*, 16 O.D. 289); and that, therefore, the assignments of error are not well taken; judgt. of the common pleas court affirmed at costs of appellant and cause remanded to said court for execution of judgt. Smith, PJ, & Straub, J. concur. See j.e.

Brown, J. dissents, finding that the Fifth Amendment privilege gives deft the right to refuse to answer the interrogatories on gambling activities on authority of *Malloy vs. Hogan*, 378 U.S., p. 1, Syllabus 10, and that default judgt. for the full amount claimed in a tort action for a penalty (*Cooper vs. Rowley*, 29 Ohio St. 547) cannot be entered without proof of and assessment of damages (See *State Auto Mutual Ins. Co. vs. Leist*, 24 O.O. 2d 7).

INTERROGATORIES SUBMITTED BY RESPONDENT.

3. Pursuant to O. R. C. 3763.05, plaintiff demands answers to the following interrogatories by each of the defendants severally, to-wit:

1. Are they acquainted with the said Thomas C. Ellis and if so, the nature and duration of their relationship?

2. Have they ever played cards or any other game of chance with the said Thomas C. Ellis, either for a valuable consideration or otherwise?

3. Did they meet with the said Thomas C. Ellis on or about November 2, 1966, either at the Windsor House, 1920 Collingwood Boulevard, Toledo, Ohio, basement recreation room or any other place?

4. Have they ever played cards or any other game of chance in the recreation room located on the basement level of the Windsor House?

5. Did they present for payment any cashiers check of the Ohio Citizens Trust Company or any check of the Ohio Citizens Trust Company on or about November 2, 3, or 4, 1966, to any bank?

6. If the answer to the foregoing question is affirmative, how did such check come into their possession and what was the consideration for such check?

7. Did they receive from Thomas C. Ellis anything of value on or about November 2, 1966, whether represented by cash, check or otherwise and if so, what was the consideration for such receipt?

8. Are they acquainted with any person by the name of or uses the name of Murray Miller and if so, what is the nature of the relationship with him?

9. Did they present to or otherwise give or deliver to the said Murray Miller any cashiers or official check of the Ohio Citizens Trust Company on or about November 2, 3, or 4, 1966?

10. Did any agent or employee of the owner of the Windsor House Apartment Building have any knowledge whatsoever that the basement recreation room was being used for card games or other games of chance?

ORDER OF THE OHIO SUPREME COURT OVERRULING MOTION TO CERTIFY RECORD.

It is ordered by the Court that this motion is overruled.

ORDER OF THE OHIO SUPREME COURT DISMISSING APPEAL AS OF RIGHT.

This cause, here on appeal as of right from the Court of Appeals for Lucas County, Ohio, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.